IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

ARBITRATION PETITION (LODGING) NO.428 OF 2006

Hutchison Essar Limited).. Petitioner

Versus

M/s.BPL Communications and others).. Respondents

Mr.I.M. Chagla, Senior Counsel, with Mr.Virag Tulzapurkar, Senior Counsel, Ms.Pallavi Shroff, Mr.Indranil Deshmukh, Mr.Amit Sibbal and Ms.Saloni Gupta i/b.Amarchand Mangaldas & S.A. Shroff & Co. for the Petitioner.

Mr.Janak Dwarkadas, Senior Counsel, with Mr.S.V. Doijode i/b.Doijode & Associates for Respondent Nos.1 and 2.

Mr.D.J. Khambata, Senior Counsel, with Mr.S.V. Doijode i/b.Doijode & Associates for Respondent No.3.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 10TH AUGUST 2006

P.C. :

. This Arbitration Petition has been filed for reliefs under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

2. The facts giving rise to the present Petition are as follows :-

. Essar Teleholdings Limited and BPL Communications Limited agreed to sell equity shares held by them in Respondent No.3 Company to the Petitioner. The Essar Teleholdings Limited and BPL Communications Limited formed a partnership firm i.e. Respondent No.1 on 17th January 2006. Respondent No.1 holds 83.9% of the paid up equity share capital of Respondent No.3 Company. Respondent No.2 holds 16.01% of the paid up equity share capital of Respondent No.3 Company.

3. The Petitioner entered into a term sheet agreement dated 26th September 2005 with Essar Teleholdings Limited and BPL Communications Limited and agreed to purchase from them the equity shares of Respondent No.3 Company held by them i.e. 100% of the paid up and outstanding share capital of Respondent No.3. The parties agreed that the transaction would fructify into a definitive share purchase agreement. Accordingly, the Petitioner deposited an amount of 4,930 million with Essar Teleholdings Limited by way of an initial deposit. On 10th October 2005, the Petitioner deposited a further amount of Rs.570 million with Essar Teleholdings Limited. A Share Purchase Agreement was executed between the Petitioner, the Vendors i.e. Essar Teleholdings Limited and BPL Communications Limited and Respondent No.3. The Vendors undertook to sell

86,137,177 fully paid up equity shares of Respondent No.3. These shares represented 99.99% of the paid up and issued equity share capital of Respondent No.3 Company. The total agreed purchase price/consideration was Rs.14,399,813,708/-.

4. The Share Purchase Agreement was later amended by an Amendment Agreement dated 30th March 2006 under which the consideration was increased to Rs.16,633,381,000/-. The Long Stop Date was extended to 31st July 2006. The partnership firm formed by Essar Teleholdings Limited and BPL Communications Limited agreed that all rights and obligations of the aforesaid Companies under the Share Purchase Agreement would be those of Respondent No.1. The Petitioner paid certain additional amounts to Respondent No.1. According to the Petitioner, it has paid about 97.5% of the consideration in terms of the Share Purchase Agreement and the Amendment Agreement. About Rs.492,596,734/- remains to be paid out of the total purchase consideration. The Petitioner has averred in the Petition that it is ready and willing to pay this amount immediately.

5. Under the Share Purchase Agreement, certain stipulations were mentioned including that time was essence of the contract. The Long Stop Date that was mentioned in the Share Purchase Agreement was extended

upto 31st July 2006 by the Amendment Agreement of 30th March 2006. The parties had agreed that the necessary conditions precedent to completion of the Agreement were to be complied by the Vendors i.e. Essar Teleholdings Limited and Respondent No.2 before the Long Stop Date. The parties also agreed under Clause 4.1(iii) of the Share Purchase Agreement that receipt of regulatory and other approvals which are necessary, including the approval of the Department of Telecommunications (DoT) for the intra circle acquisition of the Company were to be fulfilled on terms satisfactory to the Petitioner. According to the Petitioner, Clause 5 read with Clause 17 of the Share Purchase Agreement gave the right to the Petitioner to waive the conditions precedent set out in Clause 4.1 of the Agreement. The Petitioner accordingly vide its letter dated 31st July 2006 informed the Respondents that it had waived all the conditions precedent to completion of the transaction under the Share Purchase Agreement. The Respondents by their letter dated 1st August 2006 terminated the Share Purchase Agreement and refused to complete the transaction. It is in these circumstances that the Arbitration Petition has been filed.

6. The learned Counsel appearing for the Petitioner contends that all the conditions precedent which were stipulated in the Share Purchase Agreement and the

Amendment Agreement were to enure to the benefit of the Petitioner. The Petitioner had, therefore, a right to waive these stipulations under Clauses 5.1, 10(iv) and 17. It is in these circumstances that the Petitioner waived these conditions precedent stipulated in Clause 4.1 of the Share Purchase Agreement and informed the Respondents accordingly by their letter dated 31st July 2006. The Petitioner sought to complete the transaction by showing its willingness to deposit the remaining amount of the consideration with the Respondents. The learned Counsel contends that the Respondents who have been paid about 97.5% of the agreed price, have terminated the Share Purchase Agreement illegally and contrary to the provisions of the Agreement. The learned Counsel submits that if at all the transaction is completed without the conditions precedent stipulated therein being complied with by the Respondents, it is the Petitioner who would be at the risk of acquiring the shares of Respondent No.3 without the necessary compliance of the stipulations in the Agreement. It is submitted that it is necessary to restrain the Respondents from selling their shares pending the arbitral proceedings. Clause 22 of the Share Purchase Agreement is pointed out wherein the parties had agreed and acknowledged that in the event any of the provisions of the Agreement not being performed in accordance with the terms therein, the aggrieved party would be entitled

to an injunction to prevent breaches of the provisions of the Agreement and to enforce terms of the Agreement specifically in addition to any other remedy that may be available. The learned Counsel submits that it is absolutely necessary to restrain the Respondents from parting with the shares of Respondent No.3 before the arbitration commences and during the pendency of the arbitration. The learned Counsel for the Petitioner urges that the shares of Respondent No.3 Company cannot be purchased in the open market and damages would not be adequate compensation in the event the shares are sold by the Respondents. It is submitted that the arbitration would become infructuous if the suit shares are sold. No prejudice would be caused to the Respondents as they have been paid about 97.5% of the consideration already. Reliance is placed on the judgments in the case of *Firm Ashok Traders* vs. *Gurukukh Das Saluja*, **(2004) 3 SCC 155**, *Transmission Corpn. of A.P. Ltd.* vs. *Lanco Kondapalli Power (P) Ltd.*, **(2006) 1 SCC 540**, *Newage Fincorp (India) Ltd.* vs. *Asia Corp Securities Ltd.*, **2000 (4) Mh.L.J. 134**, *National Shipping Company of Saudi Arabia* vs. *Sentrans Industries Ltd.*, **AIR 2004 BOMBAY 136**, *Tulip Hospitality Services Ltd.* vs. *Siddhivinayak Realties Pvt. Ltd.* (**Arbitration Petition (L) No.218 of 2006**) and *Brooke Bond India Ltd.* vs. *U.B. Ltd.*, **1994 Company Cases (Vol.79) 46**.

7. The learned Counsel for Respondent Nos.1 and 2 submits that the Petitioner is guilty of suppressing material facts from the Court and, therefore, no relief should be granted to the Petitioner. The learned Counsel for Respondent Nos.1 and 2 submits that the written consent of DoT is mandatory before any licensee can either directly or indirectly assign or transfer its rights to any other party. Any violation of this term of the licence can be construed as a breach of the license agreement which would entail termination of the license. He points out that the written consent permitting such a transfer whenever a merger of two licensee companies is approved by the High Court is mandatory, to avoid one party monopolising the telecom services. Clause 9 of the licence issued to Respondent No.3 stipulates that the licensee must ensure that no single company/legal person either directly or through its associates shall have a substantial equity share holding in more than one licensee company in the same service area for the same service. Substantial equity means an equity of 10% or more. According to the learned Counsel, this stipulation indicates that it is mandatory for the parties to acquire the DoT approval before there can be any acquisition of shares of Respondent No.3 Company. The learned Counsel points out that it was for this reason that the Petitioner has

approached the DoT by the letter of 16th May 2006 for permission to merger the license of the Petitioner with Respondent No.3 Company. In this proposal for merger, the Petitioner has requested the DoT as follows :-

> "VI. Request to DoT
>
> Based on the above, we respectfully request you to approve :
>
> (a) the Proposed Transaction i.e. the Proposed Acquisition of the entire 100% issued and paid up equity share capital of BMCL by HEL and the Proposed Merger of HEL and BMCL through a court approved merger process as per the Companies Act. After Completion of the Proposed Acquisition, HEL to apply within one year for the Proposed Merger of HEL and BMCL through the court approved merger process under Companies Act is a lengthy one in India and an IPO will not be possible as long as the Company is in the midst of a restructuring by way of merger.
>
> (b) That HEL (the merged company), (upon completion of the merger between HEL and BMCL), be allowed to retain 20+20MHz spectrum (i.e. current 10+10MHz each of allotted spectrum to HEL and BMCL)."

An undertaking was also furnished by the same proposal in the following terms :-

> "V. Undertaking
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> Upon receipt of DoT's permission, HEL will acquire the entire 100% of the issued and outstanding equity share capital of BMCL, HEL and BMCL will thereafter initiate steps in connection with the Proposed Merger of HEL and BMCL through a court approved merger process. Each of HEL and BMCL will make best efforts to ensure that all relevant documents and consents for the Proposed Merger are prepared

> and filed with the appropriate courts within 12 months from the Completion of the Proposed Acquisition and that the Proposed Merger is completed within 24 months from the Completion of the Proposed Acquisition."

The learned Counsel, therefore, submits that the mandatory requirement of the DoT must be complied with before the transaction can be completed. The Petitioner not having completed the transaction within the time stipulated i.e. the Long Stop Date which is 31st July 2006, the Agreement was liable to be terminated.

8. The learned Counsel relies on the judgment in the case of *A.P. Christians Medical Educational Society* vs. *Government of Andhra Pradesh*, **(1986) 2 SCC 667**, in support of his submission that any mandatory requirement of the Government must be complied with by parties and the Court cannot by any order permit a party to disobey the laws of the land. He then relies on the judgment in the case of *Cotton Corporation of India Limited* vs. *United Industrial Bank Limited*, **(1983) 4 SCC 625**, in support of his submission that a temporary or interim injunction should be granted to a party during the pendency of a proceeding so that while granting final relief the Court is not faced with a situation that the relief becomes infructuous. But he points out that the temporary injunction which the Court grants should aid the final relief which could be awarded to the

Petitioner. The learned Counsel submits that, in the present case, the Arbitrators would not be able to grant the final relief in view of the requirement of the prior approval from the DoT for acquisition of the shares and hence there is no need to grant any interim relief.

9. The learned Counsel then submits that no irreparable loss would be caused to the Petitioner if interim reliefs are not granted. The amount paid to the Respondents by the Petitioner is merely a deposit. He urges that the balance of convenience is in favour of the Respondents as the Petitioner would be able to act on the basis of Clause 17 of the Share Purchase Agreement which would in effect strangulate the working of Respondent No.3. The learned Counsel contends that once the Agreement has been terminated under Clause 10.1(iv), the provisions of the Agreement cannot be acted upon by either party.

10. The learned Counsel appearing for Respondent No.3 supports the submissions advanced on behalf of Respondent Nos.1 and 2. He further points out that the Petitioner has sought to act on the Share Purchase Agreement by poaching on the employees working in very high positions with Respondent No.3 Company without waiting for completion of the transaction. He submits that any breach of the conditions of the license which

Respondent No.3 Company holds would result in its license being cancelled. The learned Counsel further submits that the interest of Respondent No.3 would be jeopardised if the Agreement is acted upon or completed without the mandatory requirements being complied with.

11. At this interim stage, I am required to consider whether a prima facie case has been made out by the Petitioner; whether any irreparable injury would be caused to the Petitioner if interim relief is not granted and what is the balance of convenience in the present case.

12. An arguable case has been made out by the Petitioner, namely, that the DoT approval is required only when licenses are to be merged and not for mere acquisition of shares. The merger of licenses would occur only after acquisition of shares of Respondent No.3 Company. If the Petitioner is not granted interim relief and the Respondents are permitted to sell the shares even before the arbitral proceedings commence, the Petitioner’s interest would be jeopardised and the arbitration proceedings will be frustrated. The Share Purchase Agreement specifically provides that a party aggrieved due to a breach of the conditions of the Agreement can claim specific performance of the Agreement besides other reliefs.

13. In my view, if the shares are sold prior to the Arbitral Tribunal being constituted and before it considers an application made under Section 17 of the Arbitration and Conciliation Act, 1996, the Petitioner would face an irreparable loss as these shares are not listed. Furthermore, in the event the Petitioner succeeds in the arbitration proceedings and the shares have already been sold, the entire proceedings would be frustrated. Apart from this, the Respondents can always be compensated when the arbitration proceedings come to an end. The Respondents are in no way prejudiced since they have already received 97.5% of the consideration. I am unable to accept the submissions made on behalf of the Respondents that the amount paid constituted a deposit and was not paid towards the consideration stipulated in the Share Purchase Agreement. In any event, under Clause 8.5 of the Share Purchase Agreement, the Respondents would only be entitled, prima facie, to receive an aggregate amount equivalent to the purchase consideration amount, less the initial deposit and additional deposit if the Agreement is not completed by the Long Stop Date.

14. The balance of convenience is also in favour of the Petitioner as it would be necessary to protect the shares which are the subject matter of the dispute till

such time as the Arbitral Tribunal is ceased of the matter and considers whether interim relief should be granted. In my view, it would be necessary to direct the parties to maintain status quo in respect of the suit shares.

15. The learned Counsel for the Petitioner has restricted the reliefs claimed in the Petition to an order directing the Respondents from in any manner selling, transferring or creating third party rights in respect of the suit shares. After consideration the submissions advanced at the bar and the judgments relied on, it would be appropriate to pass the following order while disposing off the present Petition.

O R D E R

(a) The Respondents, their directors, principals, partners, representatives, associates, subsidiaries, successors, assigns, agents, officials, employees, representatives are restrained from transferring the suit shares or create any third party interest in the shares before the Arbitral Tribunal is constituted and for a period of four weeks thereafter.

(b) The parties may apply to the Arbitral Tribunal for extension or modification or variation of this order under Section 17 of the Arbitration and Conciliation Act, 1996.

(c) The amounts which have already been paid to the Respondents need not be refunded immediately but within five business days after the injunction ceases to operate.

16. Petition disposed off accordingly.